No. 91-429

In The

Supreme Court of the United States

October Term, 1991

IN RE GEORGE R. WESTFALL.

On Petition for Writ of Certiorari to the Supreme Court of Missouri

BRIEF IN OPPOSITION FOR RESPONDENT MISSOURI BAR ADVISORY COMMITTEE

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QUESTIONS PRESENTED FOR REVIEW[1]

Petitioner was disciplined by the Missouri Supreme Court for violating Rule 8.2(a). Rule 8.2(a) of the Missouri Rules of Professional Conduct provides:

> A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the . . . integrity of a judge . . . .

The question presented is:

Whether the Missouri Supreme Court, consistent with the First Amendment, may discipline a lawyer under Rule 8.2(a) for public remarks about a state judge where the court finds that the lawyer's speech was defamatory under Missouri law, impunging the integrity of the judge and maligning his professional conduct and where the lawyer admits that at the time the speech was made he had no basis to question the judge's integrity or the judge's conduct, and further admits that he made no effort to determine whether or not any of his defamatory statements had any factual basis.

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1. Petitioner's articulation of the question presented for review constitutes an essential mischaracterization of the case below and an abject misstatement of the findings of the Missouri Bar Advisory Committee, of the Special Master, and the decision of the Missouri Supreme Court. At no time has any finder of fact ever determined that petitioner's attack on the appellate judge was merely "criticizing an appellate court opinion". Each fact finder determined that petitioner was disciplined for attacking a judge's integrity.

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STATEMENT OF THE CASE

On August 9, 1988, speaking for a unanimous Missouri Court of Appeals, Judge Kent Karohl authored an opinion prohibiting the State of Missouri, through the St. Louis County Prosecuting Attorney's office, from proceeding to charge and try one Dennis Bulloch with armed criminal action. The opinion deferred for further fact finding the issue of whether or not such charges against Bulloch were motivated by prosecutorial vindictiveness.[2]

2. The issue of prosecutorial vindictiveness is presently on appeal to the Missouri Court of Appeals, Western District, following Bulloch's subsequent conviction for arson. These second charges, armed criminal action and arson, were instigated by petitioner in this case in his role as Prosecuting Attorney of St. Louis County.

Concurring in the opinion were two other judges of the Court of Appeals, one of whom was a former prosecuting attorney.[3] The prohibition opinion was issued as a result of an underlying first degree murder case judicially described as follows:

> On May 6, 1986, (Bulloch's) wife was asphyxiated when two strips of cloth were placed on her mouth and retained by tape wrapped around her face and over her mouth. The victim died at the family home, in which a fire occurred almost immediately following her death. Indicted on a charge of first degree murder in August, 1986, and a month later on the charge of second degree arson, (Bulloch) was first tried for murder and the state elected to seek the death penalty. At trial, Bullock contended his wife's death was an accident resulting from an episode of consensual sexual bondage, but admitted starting the fire. The jury found the relator not guilty of first or second degree murder, and returned a verdict of guilty on the lesser offense of involuntary manslaughter. Relator was sentenced to a term of seven years imprisonment.
>
> Following the homicide trial, (Bullock) was indicted on additional charges of armed criminal action and tampering with physical evidence . . . In response to a motion to dismiss that indictment, the State contended that the tape and gag constituted a dangerous instrument. (The trial court) overruled (Bulloch's) motion to dismiss which was based on claims of double jeopardy, collateral estoppel,

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3. In petitioner's attack on Judge Karohl, he made no attack on either of the concurring judges.

absence of legislative intent, and denial of due process in the form of prosecutorial vindictiveness.

State ex rel. Bulloch v. Seier, 771 S.W. 2d 71 en banc (Mo. 1989).

Immediately after learning of the appellate court opinion, petitioner, without making an investigation of any kind, spoke to a television reporter. At that time petitioner knew that Judge Karohl was a man of impeccable personal integrity (Tr. 66-5 to 6) and was "a fine man" and a "fine judge", and petitioner knew that Judge Karohl was not engaging in and had not engaged in any act of professional misconduct, nor violated his judicial oath. Petitioner Westfall spoke to the press without any studied consideration or research. He did not examine any records or reported decisions to determine whether or not Judge Karohl had ever decided an armed criminal action case before, nor did he make any effort to determine whether or not there was a pattern to Judge Karohl's decisions in criminal cases.[4]

Armed with actual knowledge that Judge Karohl was a man of impeccable integrity and faithful to his oath and office, petitioner nonetheless, on television, set out to and personally attacked Judge Karohl referring not to the opinion, but specifically to Judge Karohl, utilizing in each instance either the judge's name or the personal pronoun (App. 62, Master's Findings, 26). Respondent communicated to the television public: (1) That Judge Karohl failed to follow the "Supreme Court of the Land"; (2)

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4. Westfall's assertion in the hearings that he simply intended to convey that Judge Karohl's judicial bent to begin with "is far too liberal to suit him" is intriguing. Any research into this *ex post facto* justification would have revealed that Judge Karohl, during the time he has been on the Missouri Court of Appeals for the Eastern District, almost invariably votes to affirm criminal convictions and to deny post-conviction relief. A simple check would have revealed that this "liberality" is manifested in a pattern definitively favoring the prosecution.

that Judge Karohl really distorted the statute to arrive at a decision he personally likes; (3) that Judge Karohl made up his mind before he got the case; (4) that the decision he reached was a conclusion that he personally wanted to arrive at; and (5) that all of this was done for "reasons a little bit less than honest" (App. 59, Master's Findings, 21, 40, 41).

Following two television showings of his remarks, lawyers and others called Judge Karohl to question whether or not petitioner's attacks were true and whether or not those attacks would have the effect of influencing or coercing future court decisions (MBA Exhibit 1, P28-29; App. 60, 90-91). At the same time, various lawyers called to either petitioner's attention or his employees' attention the fact that petitioner had unjustifiably accused Judge Karohl of being dishonest (Tr. 83, Resp. App. 7a).

Following complaints received by members of the bar based on this unwarranted attack, the Missouri Bar Advisory Committee, in accordance with Rules 4 and 5 of the Missouri Rules of Civil Procedure, conducted an investigation; took evidence and determined that George R. Westfall was guilty of a violation of Rule 8.2, finding that he had made a statement, knowing the statement to be false, and that he had made statements with reckless disregard as to their truth or falsity, all of which concerned the integrity of a judge. Petitioner refused to accept his punishment, as a result of which an information was filed with the Missouri Supreme Court.

A second hearing was then held before a Special Master who, after hearing the evidence, arguments, and briefs of counsel, rendered his recommendation. The Special Master found: (1) that respondent knew and believed that the judge "was a man of personal and professional integrity"; (2) that respondent's statement exposed the judge to hatred, ridicule or contempt, and reflected unfavorably on his personal morality and integrity; (3)

that the statement falsely imputed fraud, want of integrity, and misconduct in the judge's professional work; (4) that the statement falsely imputed criminal conduct; (5) that the statement disparaged the judge; (6) that the statement disparaged the Court of Appeals in its function in the administration of justice. The Master further found "that respondent made the statement with malice, *i.e.*, knowing its falsity or with reckless disregard of its truth or falsity.

Applying the law to these fact findings, the Master concluded that petitioner's statement violated Rule 8.2 and that the application of the rule was not "unconstitutional" as a violation of the free speech clause of the First Amendment (Master's Rulings, 40-41, App. 73, 74). The Master's analysis was based upon his determination that the statements were, in fact, defamatory (App. 58-64); that they were, in fact, false (App. 65-66); and that the requirement of malice articulated by the *New York Times* rule was met (App. 66-67)

Following rendition of the Master's report, exceptions were filed and the matter was then reviewed. The Missouri Supreme Court affirmed the Master's finding that petitioner violated Rule 8.2(a) of the Missouri Rules of Professional Conduct and affirmed both the fact findings and the rationale utilized by the Master. Contrary to petitioner's statement, the Missouri Supreme Court affirmed the Master's use of the *New York Times* requirement of malice, finding that the Master was correct when he determined the statements to be defamatory and to have been made either knowingly or with reckless disregard as to their truth or falsity.

Both the Special Master and the Misssouri Supreme Court rejected petitioner's "retrostatements" as a defense, determining that respondent's post-defamation characterizations of his intention were not supported by the facts, *i.e.*, were not believable, and that his subjective protestations of innocent intent were not persuasive (and, in fact, objectively not true).

REASONS FOR DENYING THE WRIT

I.

THE FACTS OF THIS CASE DO NOT PRESENT ANY CONSTITUTIONAL ISSUE.

The first four sentences of respondent's petition articulating the "questions presented for review" clearly illustrate that this case does not present an appropriate vessel for the examination of any issue. Petitioner in these four sentences attempts to mislead this Court as to the basis on which petitioner was disciplined. His request refuses to honestly acknowledge the basis on which discipline was imposed. Instead, petitioner distorts his case by asserting "a state Supreme Court disciplined a lawyer under its ethics rule for publicly criticizing an appellate court opinion." Respondent respectfully suggests that a petition for certiorari which refuses to candidly state the issue cannot be a proper basis on which to examine any real or manufactured constitutional issue.

The Missouri Supreme Court addressed as its first order of business petitioner's assertion that he criticized the opinion as opposed to the judge. That defense, *i.e.*, "I criticized the opinion, not the judge", was first presented to the Advisory Committee and rejected; then to the Master and rejected; and then specifically rejected by the Supreme Court when it stated:

> This Court first addresses respondent's protestations that his statements were merely expressions concerning the soundness of the Court of Appeals decision, not statements of actual provable facts about the judge's integrity. His contentions are not well taken . . . The statements personalized the judge's conduct and specifically referred to him, his motivation, and his integrity

> as it relates to his participation in the appellate judicial process.

(App. 5).

This Court traditionally accepts the fact findings of the courts below on issues of disputed facts and then, having accepted the conclusion of a state court as to the facts of a situation, only examines the federal constitutional implication of those facts. *See, e.g., Milk Wagon Driver's Union v. Meadowmoor Dairies,* 312 U.S. 287, 293-294, 85 L. Ed. 836, 841-842, 61 S. Ct. 552; *Lisenba v. California,* 314 U.S. 219, 238, 86 L. Ed. 166, 180, 62 S. Ct. 280.

It is inappropriate to accept as a vehicle of constitutional interpretation a case which is framed on a false premise. Factually, the essence of this petition is the claim that if this Court will only believe and accept petitioner's statements as true, and believe what petitioner now says he intended when he made his statement, and if it will only accept his characterization and colorization of the content of his speech, then the Court will find that speech to be protected. This Court has not, since *New York Times v. Sullivan,* 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710, examined the factual questions of whether or not a statement is defamatory, nor whether or not the statement is false. Rather, this Court has limited itself to a factual review as to whether or not "the evidence in the record in a defamation case is sufficient to support a finding of actual malice" since that question is a question of law. *Bose Corp. v. Consumer's Union of United States, Inc.,* 466 U.S. 485, 510-511, 80 L. Ed. 2d 502, 104 S. Ct. 1949.

Before any cognizable constitutional issue is presented here, this Court would have to reject the findings of the Missouri Bar Advisory Committee, the findings of the Special Master, and the findings of the Missouri Supreme Court as to the substance of and effect of petitioner's statement and reject the conclusion that

"respondent's statement imputed a lack of integrity and misconduct in the judge's professional work" (App. 16).

The fact findings "unmistakably" require the conclusion that no constitutional issue exists. It is unquestionably true that the significant values behind the First Amendment require tolerance of a merely erroneous utterance. *Garrison v. Louisiana,* 379 U.S. 64, 13 L. Ed. 2d 125, 85 S. Ct. 209. "Untruthful speech, commercial or otherwise, has never been protected for its own sake." *Virginia State Board of Pharmacy v. Virginia Citizens Cons Council,* 425 U.S. 748, 771.

Indeed,

> False statements of fact are particularly valueless: they interfere with the truth-seeking function of the marketplace of ideas and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective.

Hustler Magazine v. Falwell, 485 U.S. 46, 49.

As the Master noted (App. 56):

> Free speech values are not at all served by circulating false statements of fact about public officials. On the contrary, erroneous information frustrates these values. They are even more disserved when the statements falsely impugn the honesty of those men and women and hence lessen the confidence in government.

Justice White, *Dun & Bradstreet v. Green Moss Builders,* 472 U.S. 749, 767 (1984).

The facts in this case are that respondent's personalized attack on the appellate court judge was defamatory under Missouri state law (A-58-65) and false (A-65-66), and was made with "actual malice" as defined in *New York Times Co. v. Sullivan* and later cases. This Court should accept the factual determinations that the statement made was both defamatory and false. *St. Amant v. Thompson,* 390 U.S. 727, 730, 20 L. Ed. 2d 262, 88 S. Ct. 1323.

The maximum protection this Court has ever extended to false defamatory statements about a public official is the *New York Times* addition of the requirement that the defamatory falsehood be made "with actual malice — that is, with knowledge that it is false or with reckless disregard of whether it was false or not."[5]

Rule 8.2(a) of the Missouri Rules of Professional Conduct under which petitioner was disciplined requires that precise finding, to wit, that the statement "be false or (made) with reckless disregard as to its truth or falsity . . . "

In order to create facial appeal, in the language of the Missouri Supreme Court, "respondent seeks to obfuscate the issue" (App. 6). Petitioner admittedly knew at the instant of his speech that the appellate judge he was about to vilify was, in truth and fact, a person of impeccable integrity who had engaged in no personal or professional misconduct with respect to the rendition of the *Bulloch* opinion. In light of this fact, there is no argument that petitioner uttered his defamatory remarks with "actual malice." This case requires no constitutional confrontation.

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5. The phrase "actual malice" as used in *New York Times* is not at all related to bad motive or ill will and does not require any evidence of bad motive or ill will. *Rosenbloom v. Metro Media, Inc.*, 403 U.S. 29, 52 note 18, 29 L. Ed. 2d 296, 91 S. Ct. 1811 (1971), opinion by Justice Brennan.

A. Petitioner Demonstrated Actual Malice.

New York Times requires "a false statement of fact which was made . . . with knowledge that the statement was false."

It is without doubt that at the time the petitioner accused Judge Karohl of deliberate dishonesty and of purposefully ignoring the law to achieve his own personal ends (App. 6) that petitioner, in fact, knew that Judge Karohl was a man of impeccable integrity who had not engaged in any misconduct in the performance of his job (Excerpts from Transcript of Formal Hearing, Resp. App. 1a-2a). *See also,* Special Master's Findings of Fact (App. 70, 73). Petitioner does not claim that he made statements of fact which were true. Indeed, petitioner must concede that if what he says is a "statement of fact", then it was false because at the time petitioner made the statement he admittedly knew that the judge had not engaged in professional misconduct, and he affirmatively knew the judge to be a man of impeccable integrity.

This reality terminates the constitutional consideration, for what petitioner actually argues is that he did not make a "statement of fact." Petitioner's entire assertion is based upon his colorization of the true, *i.e.*, his assertion that all he did was "criticize an appellate court opinion." Therefore, petitioner's complaint is not with the standard contained in Rule 8.2(a), but with the Missouri law as to what constitutes defamation. Petitioner's true request is that this Court take what he intended to say or what he wanted to say and find that the language does not constitute a "statement of fact." As previously noted, this function is outside the role of the petition for writ of certiorari. No question exists in this case as to the definition of "reckless disregard." No question exists in this case as to whether or not the evidence justifies a finding of "actual malice" because the respondent has provided unmistakable evidence that at the time the speech was made petitioner actually knew it was false. That is, petitioner had "actual

knowledge" that Judge Karohl had not engaged in professional misconduct and was a man of impeccable integrity.

B. Petitioner's Remarks Were Statements of Actual Fact.

The asserted conflict with *Milkovich v. Lorraine Journal Company* does not withstand analysis. *Milkovich* specifically declines to add "an additional separate constitutional privilege for 'opinion' ." *Milkovich v. Lorraine Journal Company*, ____ U.S. ____, 111 L. Ed. 2d 1, 19, 100 S. Ct. 2695. *Milkovich* also specifically rejects the "artificial dichotomy" between opinion and fact.

Milkovich simply asks:

> The dispositive question in the present case becomes whether or not a reasonable fact finder could conclude that the statements in the Diadiun column imply an assertion that petitioner *Milkovich* perjured himself in a judicial proceeding.

111 L. Ed. 2d at 19.

Milkovich, in fact, holds that there is a line of cases represented by *Hustler Magazine v. Falwell, supra* that "provide protection for statements that cannot 'reasonably (be) interpreted as stating actual facts' about an individual." 111 L. Ed. 2d at 19. Thus, the parody and hyperbole or exaggerated response talked about in *Hustler, supra* is protected.

Westfall does not run afoul of *Milkovich*, nor of this constitutional standard. As pointed out in *Hustler*, 485 U.S. 46, 57, 99 L. Ed. 2d 41, 53, 108 S. Ct. 876:

> The jury found against respondent on his libel claim when it decided that the Hustler ad parody could not reasonably be understood as describing actual facts about (respondent) or actual facts in which (he) participated . . . The Court of Appeals interpreted the jury's finding that the ad parody was not reasonably believable . . . and *in accordance with our custom we accept this finding.*

(Emphasis added).

The Special Master determined that the statements made were statements of fact (App. 67-72) and specifically held that the statements made were "sufficiently factual to be susceptible of being proved true or false." The Missouri Supreme Court concurred:

> Respondent's statements clearly imply an assertion of objective fact regarding Judge Karohl's judicial integrity . . . Respondent's language, at the very least, implies that the judge's conduct exhibited dishonesty and a lack of integrity and is sufficiently factual to be susceptible of being proved true or false.

(App. 6). It is to this fact finding that this Court "customarily defers." *Hustler, supra.*

Contrary to petitioner's assertion, this is not a lawyer giving vent to his disappointment in tavern or press. This is a lawyer who stated that a judge had prejudged a case for his own personal reasons and that, in doing so, the judge was "a little bit less than honest." Deciding a case for "dishonest reason" is, in fact, a direct assertion that the judge "was corrupt or venal . . . ."

The petitioner's statements have been found to be statements impugning Judge Karohl's integrity and professional conduct. These are provable objective facts. Petitioner himself recognized this when he admitted that Judge Karohl did not lack integrity. Only under petitioner's distorted version of his words is there even a hint of a constitutional question under *Milkovich*. In truth, there is no constitutional question.

C. Petitioner's Discipline Does Not Conflict With *Gentile*.

Gentile v. State Bar of Nevada, 111 S. Ct. 2720 (1991) does not suggest a grant of certiorari. *Gentile* deals only with pretrial publicity and relates only to the ability of a state to discipline a lawyer for what was claimed to be an extrajudicial statement that the lawyer knew or should know would have a likelihood of materially prejudicing an adjudication. Nothing in *Gentile* remotely relates to a diciplinary rule that prohibits a defamatory falsehood made with knowledge that the defamation was not, in fact, true, or made with reckless disregard to the truth. The concern in *Gentile* was the proper balancing of an attorney's First Amendment rights with the defendant's right to a fair trial and to due process.

Westfall is in no way related. A false defamatory statement made with actual malice in the context of a trial or in the context of pretrial publicity finds no solace in *Gentile*. Were it charged that Westfall's statements violated the rule prohibiting pretrial publicity, then in order to constitutionally discipline Westfall under *Gentile*, the content of the statement wuld have to meet the *Gentile* criteria. Nothing in *Gentile* permits the conclusion that, to the extent *Gentile* speaker's pretrial comments were also defamatory falsehoods made with actual malice, a disciplinary action against the speaker could not be maintained under Rule 8.2(a).

To look to *Gentile* and to assert that there is some requirement that the criticism must prejudice an adjudicative proceeding is simply to grasp at straws.

The limitations imposed on a lawyer's speech by Rule 8.2(a) have a constitutional basis. Defamatory falsehoods made with malice are outside of the limitation formulated from *Gentile*.

D. The Missouri Supreme Court Correctly Applied the *New York Times* Rule.

To urge in this case that the Missouri Supreme Court decision provides a vehicle to resolve what petitioner claims to be differing standards among the states is to ignore that the standard utilized was purely that of *New York Times*. As an umbrella under which to examine the constitutionality of all regulation of lawyer speech, this case is inappropriate. Because the speech in this case is defamatory, there is no need to engage in any balancing.[6]

In this case, it was not necessary to determine the meaning of "reckless disregard." Nevertheless, the Missouri Supreme Court did articulate the proper standard for determining "reckless disregard." From the very beginning, it has been recognized that reckless disregard cannot be fully encompassed by one infallible definition. The Missouri court properly weighed the value of the First Amendment right to communicate to the public with the state's interest in the administration of justice. The court's approach imposed only minimal restrictions on the lawyer's speech.

This Court has repeatedly recognized that an attorney does not have an unlimited right to criticize judges. In *Bradley v. Fischer*, 13 Wall. 335, 355, 20 L. Ed. 646, 652 this Court stated:

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6. Petitioner asserts that this case presents a common question of law referring to *Holtzmann*, No. 91-409. That claim is preposterous. *Holtzmann* was disciplined under Rule 102(a)(6) proscribing conduct that adversely reflects on a lawyer's fitness to practice law. Since that rule contains no specific standard for a lawyer's speech, no common question of fact or of law exists.

> But . . . the obligations which attorneys impliedly assume . . . is not merely to be obedient to the Constitution and laws, but to maintain at all times the respect due to Courts of justice and judicial officers . . . It includes abstaining out of Court from all insulting language and offensive conduct toward the judges personally for their judicial act.

This fact was also articulated in *In re Ades*, 6 F. Supp. 467, 481 (D.C. Md. 1934):

> An attorney does not surrender . . . his right as a citizen to criticize the decisions of courts in a fair and respectful manner, and the independence of the bar, as well as of the judiciary, has always been encouraged by the courts. But the right of fair criticism does not carry with it a liberty to indulge in false and malicious assault upon the integrity of the courts, or to charge a court or judge with corruption, willful partiality, or sinister motives in the trial and decision of cases.

This Court has long been aware of the state's interest in the administration of justice. This Court has recognized the function of the American judicial system depends upon the acceptance by the public of the decision of a jury, a judge, or a court. Once falsely accused, the judge has no voice because he is "required to abstain from public comment about a pending or impending proceeding in any court." Mo. Sup. Court Rule 2, Code of Judicial Conduct, Canon 3(a)(6). Thus, while judges and the judiciary as a whole must be "thick-skinned" and should not shy away from criticism, neither may the judiciary defend itself. One of the reasons for lack of public figure protection voted by this Court in *Getz v. Robert Welch, Inc.*, 418 U.S. 323 was the access of the public official to communication and "a more realistic

opportunity to counteract false statements." That rationale is not available to the wrongfully attacked member of the judiciary.

This Court has examined state regulation of free speech in the commercial speech area. *See, e.g., Goldfarb v. Virginia State Bar,* 421 U.S. 773. The Court there invited a balancing test, noting that:

> The interest of the states in regulating lawyers is especially great since the lawyers are essential to the primary governmental function of administering justice.

Id. at 792.

Mr. Justice Holmes in *Patterson v. Colorado,* 205 U.S. 454 at 463 stated:

> . . . The propriety and necessity of preventing interference with the course of justice by premature statement, argument, or intimidation, can hardly be denied.

Even more recently in *Peel v. Attorney Disciplinary Committee,* ____ U.S. ____, 110 L. Ed. 2d 83, the Court continued to recognize that the state may absolutely ban speech that is "misleading." *Goldfarb, supra, In re RMJ,* 455 U.S. 191, 102 S. Ct. 929, 71 L. Ed. 2d 64 (1982) and *Peel, supra,* as a group recognized not only the right, but the necessity that the public not be misled, that the speech be true. Thus, this Court recognized that the state has a right to proscribe false and defamatory speech directed at the professional conduct and integrity of a sitting judge who may not ethically respond. This is the undeniable "propriety and necessity" referred to by Mr. Justice Holmes.

Lawyers' speech can uniquely affect the administration of

justice. Lawyers have considerable credibility in speaking of judges and litigation, a fact recognized by this Court in *Gentile*. Because of this enhanced credibility, it is necessary to take some measures to ensure that lawyers speak the truth. One such measure is to hold a lawyer accountable for defamatory statements when the lawyer's only justification is a subjective protestation of "I didn't intend to." Lawyers should not be allowed to clothe themselves in ignorance, cry "good faith", and avoid discipline for defamatory statements of fact which are actually false.

To require that a false publication be made with "a high degree of awareness of probable falsity" or to require the disciplinary agency to prove that the speaker "entertained serious doubt as to the truth" requires too much. A lawyer, like the patron in the movie theater, should not be allowed to cry "fire" and then avoid the consequences of his act by asserting that he thought everyone would know he was joking.[7] It could not be argued that to falsely cry "fire" was to act in "reckless disregard" for the truth. No reference to nor proof of state of mind is required any more than ill will or spite would be required. The reckless conduct then within the context of the disciplinary rule recognized by this Court in *Bradley v. Fischer* should require only that the "recklessness" be measured against the standard of the reasonable professional.

To so hold would create no conflict with any other state. Surely a state is free to apply a more speech protective test. One in New Jersey, for example, in *In re Hinds*, 90 N.J. 609, appears to require clear and present danger or serious and imminent threat in other than a criminal proceeding. Washington apparently extends a requirement of "knowledge of falsity", *In re Donohoe*,

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7. The analogy is particularly appropriate if, like the lawyer who is intimately involve with the judicial process, the patron who cried "fire" was seated next to the furnace.

90 Wash. 2d 173, 181 (1978).

The constitutional mandate is that the restriction or limitation on speech be the minimum necessary to accomplish the state protected interest. Rule 8.2 accommodates that test by requiring that the defamatory statement be made with actual knowledge or reckless disregard.

The state interest would involve significant societal interest in the adjudicatory process — an interest which must be protected for the benefit of the public as a whole. For, as stated in *In re Terry*, 271 Ind. 449, 502, 394 N.E. 2d 94-95 (1979), *cert. denied*, 444 U.S. 1007, the false accusation against the judge works a perversion of the judicial process and "the wrong is against society as a whole, the preservation of a fair, impartial judicial system, and the system of justice as it was evolved for generations." A balancing of interest clearly permits determination of recklessness based on an objective standard.

The "objective/subjective" characterizations made by petitioner are, in fact, a red herring. Even in the court's opinion, Justice Covington did not use a negligence standard. The Missouri Supreme Court, when it agreed with the Supreme Court of Minnesota that a purely subjective standard was inappropriate and that an objective standard would survive First Amendment scrutiny (App. 15), did not adopt a negligence standard. Rather, it recognized that one must look objectively at what other lawyers do as evidence of recklessness. In a private defamation action, this Court has consistently permitted proof of "state of mind" by the use of circumstantial evidence and this Court has stated ". . . it cannot be said that evidence concerning . . . care never bears any relation to the actual malice inquiry." *Harte-Hanks Inc. v. Connaughton*, 491 U.S. 657, 668, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989).

Thus, while embracing that concept in dicta, the Missouri

Supreme Court was not required to and did not measure that "state of mind" by reference to the bar as a whole. For here, petitioner admits that at the time he made his statement, he knew that Judge Karohl had not engaged in professional misconduct and that, in fact, he was a man of impeccable personal integrity. Having made that admission and thereafter having even informally apologized to the judge in question, it cannot be said that petitioner's speech was not, at the very least, reckless.

CONCLUSION

Westfall, in this case, actually asks this Court to determine that his speech was not defamatory because he intended only to attack an appellate opinion based on what he perceived to be a history of appellate dislike for Missouri's armed criminal action statute. Had petitioner ever been believed, we would not now be here. Every fact finder who has had the opportunity to judge the credibility of the petitioner has rejected this assertion. Every fact finder has recognized that the statements are, in fact, defamatory, falsely imputing criminal conduct; falsely imputing fraud, want of integrity or misconduct in the judge's work. Such statements are clearly beyond the constitutional pale.

The case truly presented by petitioner seeks only to reargue fundamental facts found against him. That is not an appropriate function for certiorari.

The petition for the writ must be denied.

Respectfully submitted,

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Missouri Bar Advisory Committee

APPENDIX A — EXCERPTS FROM THE TRANSCRIPT OF PROCEEDINGS OF FORMAL HEARING JUNE 1, 1989

MISSOURI BAR ADMINISTRATION BEFORE THE ADVISORY COMMITTEE OF THE STATE OF MISSOURI

File No. 2281

In Re: George "Buzz" Westfall

Page 60, Lines 11 through 16

> Q. State your name and address please. A. Home address? George Westfall, 2315 Gate Royal, St. Louis, Missouri 63131.
>
> Q. Mr. Westfall, your're a lawyer licensed to practice law in the State of Missouri? A. Yes.

Page 66, Lines 2 through 3

> I have respect for Judge Karohl.

Page 66, Lines 5 through 6

> But as far as his personal integrity - I don't question that in the least.

Page 83, Lines 3 through 4

> It never entered my mind to question Judge Karohl's personal integrity. . .

Appendix A

Page 83, Lines 9 through 10

> That was the thrust of the newscast that I disagreed with his opinion,. . .

Page 78, Lines 19 through 25; Page 79, Lines 1-3

> A. Sure. I told Judge Karohl this before we came in here, I saw him and I did something I've been wanting to do but I don't see him often, I went over to say good morning to him and if he seemed okay to shake his hand. I said Judge, I want to say to you face-to-face, not to influence the outcome of this hearing but we're here, I did not mean to impune or to question your personal integrity and I feel badly if that's the inference you drew or your family or some of your friends or colleagues have drawn.

* * *

Page 5, Lines 22 through 25

QUESTIONS BY MR. SCULLY:

> Q. I'll ask you at this time please state your full name. A. Kent Erwin Karohl.

Page 6, Lines 1 through 5

> Q. Your occupation, sir? A. I am an attorney and now a judge for the Missouri Court of Appeals, Eastern District.

Appendix A

Q. How long have you been an attorney, sir? A. 1958. 31 years.

Page 7, Lines 12 through 18

Q. Do you recall the circumstances under which that opinion was rendered; was it done by you or done in banc by three judges? A. I wrote the opinion, circulated the original, there were some suggested changes that were made and this is the result after considering those suggestions.

Page 9, Lines 7 through 25; Page 10, Lines 1 through 14

Q. Judge, did you at the time of signing this particular opinion have any personal interest or preference in the outcome of the case? A. Absolutely not.

Q. Did you know either of the parties? A. I knew Judge Seier.

Q. Would there have been any particular reason you would have ruled in favor of Judge Seier either as a friend or confidant? A. Absolutely not. I only know him in a professional way, he's a judge, we have heard cases in Cape Girardeau, we've used his office to put on robes, in fact I think we may have had dinner at his home, that is all the judges from our court who were down in that area at the time of the hearing, not on this occasion or anything connected to this case but I don't know him

personally, I only know him as a judge.

Q. To your knowledge did any judge have a preference one way or the other with regard to this case that participated in this opinion? A. Any accusation or allusion that I or any of the judges in this case had any interest or preference in the outcome is absolutely false.

Q. Was there any act by you or any other member of the Court of whom you are aware with regard to the management of the case or preparation of the opinion that would be quote less than honest or dishonest, close quote? A. Absolutely not.

Q. This probably is repetitious but did you know Dennis Bulloch? A. I don't know anything about the man other than by name.

APPENDIX B — EXCERPTS FROM THE TRANSCRIPT OF THE HEARING BEFORE THE MASTER

IN THE SUPREME COURT OF MISSOURI
EN BANC

No. 72022

In the Matter of:

GEORGE R. ("BUZZ") WESTFALL

Page 36, Lines 16 through 20

> Q. And in 1982 and in every time since 1982 have you not been aware that Rule 8.2 exists and that it prohibits false comments and comments made in reckless disregard as to the truth? A. Yes.

Page 43, Line 6

> Q. Mr. Westfall, you, in fact, have stated that —

Page 44, Lines 1 through 24

> Q. Did you ever read any of the prior armed criminal action opinions on which Judge Karohl sat on the panel to determine whether or not he said things like he regretted that he might have to follow what our constitution says is the rule of law in this state, i.e., the decisions of the Missouri Supreme Court? Did you ever look to see, before you accused him of prejudging the case,

to see if he had expressed other opinions about armed criminal action? A. No.

Q. Did you go out and ask the ladies and gentlemen of the press or call on your own office to review the press clippings in either the St. Louis Post Dispatch or — I can't remember the dates that the Globe has been in or out of business at that particular time — to look at any of those press clippings to see if Judge Karohl had ever made any public announcements about his personal opinion about armed criminal action? A. No.

Q. In fact, you didn't do anything in terms of researching Judge Karohl's personal opinions, is that correct? A. On armed criminal action?

Q. On armed criminal action. A. No.

Page 46, Lines 9 through 25; Page 47, Line 1 through 2

Q. You said reasons that were less than honest. You did not say reasoning, correct? A. Did not say what?

Q. You said reasons that were less than honest, not reasoning that was less than honest? A. Correct.

Q. Reasons. A. Right.

Q. And you are aware that after this press conference and after this was disseminated, lawyers

known to you came into this courthouse and made inquiry as to why you had accused Judge Karohl of being a dishonest judge, and in fact asked one of your staff members to provide you with a copy of the tape so you could see what you said? A. Two or three lawyers mentioned this to a couple of my prosecutors that I'd suggested that Judge Karohl was dishonest, so it astounded me because I knew I hadn't said that, or I felt I hadn't suggested that; so I got a hold of the tape. That's correct.

Page 48, Line 10 through 25

I want to ask you in your own defense, if you can, to explain why you say to the press that Judge Karohl prejudged this case to reach a result that he personally wanted? A. I was giving my opinion as to the decision of the overall context historically and recently of the armed criminal action statute, that the appellate judges of this state have repeatedly beat down the armed criminal action statute.

Q. How do you know that he likes this? I mean, you accused him of liking it; how do you know he liked it, sir? A. I told you before it was my opinion based on prevailing opinion among prosecutors as to Judge Karohl's judicial bent regarding criminal statutes, the historical situation with the appellate courts concerning armed criminal action.

Appendix B

Page 52, Lines 6 through 25; Page 53, Line 1

I felt that Judge Karohl would find some way to say that we could not pursue armed criminal action because of the history of the case, of the statute, and just my impression of Judge Karohl's approach to criminal law in general.

Q. Mr. Westfall, I am sure some people would agree with you that those *Sours* opinions were, perhaps, intellectually dishonest; and you say you anticipated the opinion of the appellate court might again be intellectually dishonest. However, my inquiry is: In what respect was this opinion by Judge Karohl intellectually dishonest? In what manner was it intellectually dishonest of its treatment of the legal issues which were before the Court? A. I don't feel that the State should be barred from trying the armed criminal action in the subsequent case. I think since the State is barred in the first case by Missouri law, that the State should then be allowed to pursue it in the second case. If, in fact, the State were allowed to pursue it in the first case, I would feel differently. Every other companion charge is allowed to be brought up in a subsequent trial; we did that.